Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1974

No. 74-1274

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors,

Respondent,

v.

ABBOTT LABORATORIES, an Illinois corporation; AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation; BRISTOL-MYERS COMPANY, a Delaware corporation; CARTER-WALLACE, INC., a Delaware corporation; ELI LILLY AND COMPANY, an Indiana corporation; ENDO LABORATORIES, INC., a Delaware corporation; ORTHO PHARMACEUTICAL CORPORATION, a New Jersey corporation; SQUIBB CORPORATION, a Delaware corporation; E. R. SQUIBB & SONS, INC., a Delaware corporation; A. H. ROBINS COMPANY, INC., a Virginia corporation; WILLIAM H. RORER, INC., a Pennsylvania corporation; and WARNER-LAMBERT PHARMACEUTICAL COMPANY, a Delaware corporation,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of

Appeals for the Ninth Circuit filed December 26, 1974.

OPINIONS BELOW

A copy of the oral opinion of the district court of May 25, 1973 granting petitioners' motion for partial summary judgment is attached as Appendix B, infra, A10. The court did not file a written opinion.

The opinion of the court of appeals of December 26, 1974, vacating the judgment of the district court is not yet reported. A copy is attached as Appendix A, infra, A1.

JURISDICTION

The judgment of the court of appeals was entered December 26, 1974. Petitioners filed a timely petition for rehearing and a suggestion for rehearing in banc, which was denied on March 11, 1975. A copy of the order denying the petition is attached as Appendix C, infra, A18. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Nonprofit Institutions Act, 15 U.S.C. § 13c, exempts from the Robinson-Patman Act purchases of supplies by nonprofit hospitals "for their own use." In its decision, the court of appeals held, as a matter of law, that the exemption extends only to purchases of pharmaceutical products by nonprofit hospitals

which are dispensed to hospitalized bed patients and to emergency room patients, and that purchases by such hospitals of drugs which are dispensed for other hospital functions are outside the scope of the exemption.

The question presented by the court's decision is whether drugs purchased by nonprofit hospitals are "for their own use" only if they are dispensed to hospitalized bed patients and to emergency room patients, and not if they are dispensed to registered patients treated at outpatient clinics, as "take home" drugs to departing bed patients, or to staff and employees.

STATUTES INVOLVED

1. Section 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a), 49 Stat. 1526:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or

knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

2. The Nonprofit Institutions Act, 15 U.S.C. § 13c, 52 Stat. 446:

"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

STATEMENT OF THE CASE

1. Proceedings in the District Court

Petitioners are twelve national manufacturers of pharmaceutical products. Respondent filed this action for treble damages and for injunctive relief as the assignee of the claims of some sixty commercial pharmacies doing business in metropolitan Portland, Oregon, charging petitioners with violations of the Robinson-Patman Act. The jurisdiction of the district court was invoked under 15 U.S.C. §§ 15 and 26.

The complaint stated five claims, only the second of which is before the Court on this petition.[1] In this claim, respondent alleged that petitioners discriminate in prices charged for drugs between nonprofit hospitals and these commercial pharmacies. As an affirmative defense to the claim, petitioners plead-

[1] Charges of discrimination in sales to city, county and state governments and to the federal government were dismissed for failure to state a claim. Discovery has proceeded on charges of discrimination in sales to proprietary institutions and commercial entities.

ed that drug purchases by the hospitals are exempt from the Robinson-Patman Act by the Nonprofit Institutions Act.

Following discovery on the issues of the nonprofit status and drug dispensing practices of the hospitals, petitioners filed a motion for partial summary judgment under Rule 56 F. R. Civ. Proc. On May 25, 1973 the district court granted the motion, concluding that there was no genuine issue as to any material fact with respect to the nonprofit status of the hospitals or their use of the drugs. The court held that the hospitals' purchases of drugs are exempt from the Robinson-Patman Act under the Nonprofit Institutions Act as a matter of law. See Appendix B, infra, A10.

2. The Decision of the Court of Appeals

Respondent appealed from the judgment to the Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1292(b). On December 26, 1974 the court rendered its opinion vacating the judgment. It affirmed the district court's decision that the hospitals were nonprofit institutions,[2] and it agreed with the district court that the record established the ways in which hospitals dispense drugs. However, it held as a matter of law that a hospital's "own use" of drugs under the Nonprofit Institutions Act extends only to drugs dispensed to bed patients and to patients treat-

[2] In the case of one hospital which is affiliated with a health maintenance organization, the court remanded this issue to the district court for additional discovery. Infra, A5.

ed in the emergency room, and that drugs dispensed by hospitals to patients treated in outpatient clinics, as "take-home" drugs to departing inpatients, and to staff and employees are not purchased for the hospital's "own use."

Petitioners filed a timely petition for rehearing and a suggestion for rehearing in banc. On March 11, 1975 the petition was denied. See Appendix C, infra.

REASONS FOR ALLOWING THE WRIT

The decision of the court of appeals adversely affects the purchase of hospital drug supplies throughout the United States and, in addition, the purchase of all supplies by schools, colleges, universities, public libraries, churches and charitable institutions. The proper construction of the Nonprofit Institutions Act is an important question of federal law that the court of appeals has decided and that has not been, but should be, settled by this Court.

1. The Decision Erroneously Excludes from the Scope of the Nonprofit Institutions Act Purchases of Drug Products Which Are Used in Normal and Essential Services of a Modern Hospital.

The court of appeals held that each of the hospital drug uses to which it denied the protection of the Nonprofit Institutions Act is

> ". . . a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospitals' 'own use.' Hospital use under § 13c, in our judgment, must be limited to use made by the hospital in dispensing drugs for hospital or clinic treatment

> of in-patients or emergency patients. The purpose for which these supplies are purchased — the use to which they are to be put — is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer." Infra, A7.

The court of appeals held, as a matter of law, that purchases of drugs which are dispensed in the following conventional hospital uses are not within the scope of the exemption:

(1) *Drugs dispensed to registered outpatients.* Hospitals maintain outpatient clinics where they provide services for registered hospital patients. Filling prescriptions written by hospital staff doctors for drugs used by these patients as part of their hospital treatment is a routine function of the institution. Outpatient clinics are also an important teaching facility for student doctors and nurses, and are a source of care for the medically indigent.

(2) *Drugs dispensed to departing bed patients as "take-home" prescriptions.* Under orders of the attending physician, hospitals dispense limited amounts of drugs to bed patients who are leaving the hospital, for use during their initial period of convalescence.

(3) *Drugs dispensed to staff physicians and to professional and nonprofessional employees for personal and family use.* Extending pharmacy privileges to hospital staff and employees for their personal and immediate family use is an established and important

benefit of their professional or employment affiliation with the institution.[3]

The appellate court's opinion admits that drug dispensing for these uses is a proper hospital function, but it seeks to limit the exemption to drug dispensing as to which the hospital, and not the patient, "can be said to be the consumer." Infra, A7. In so stating, the court seems to suggest that hospitals have a single function—to provide emergency and bed care for the acutely ill—and that Section 13c can have no broader application, regardless of what these institutions actually do in their community or how they deliver medical services to the public. This erroneous view of the nature of a hospital led the court below into an unrealistic analysis of a practical and important problem.

In fact, modern hospitals have evolved far beyond the limited function recognized by the court. In this process, they have not ceased to be hospitals or to "use" their supplies as hospitals. Modern hospitals are essential community facilities which deliver medical services in many ways and in many places, and their use of drugs cannot be defined in limited terms of care for bedridden patients.

This case concerns specific classes of drug dispensing in which nonprofit hospitals have customarily engaged for many years. These hospital drug uses were excluded by the court of appeals on the single ground that the person who takes the drug does not occupy a hospital bed, and therefore, in the view of the court, becomes the "consumer," whereas, according to the court, the hospital itself is the "consumer" of the pill or other medication administered to a bed patient or an emergency room patient. Its erroneous analysis strikes harshly at a Congressional purpose which the only prior Section 13c decision recognized was to allow such institutions "to operate as inexpensively as possible." *Logan Lanes, Inc.* v. *Brunswick Corp.* (9th Cir. 1967) 378 F.2d 212 at 216, cert. den. (1967) 389 U.S. 898, Anno. 3 A.L.R. Fed. 996 (1970).

[3] The decision of the court of appeals lists three additional classes of hospital drug dispensing which the record shows do not occur in legally significant amounts: Sales to physicians for use in their private practices, refills of "take-home" prescriptions, and occasional sales to "walk-in" customers (members of the public having no connection with the hospital.)

2. The Court's Erroneous Construction of the Nonprofit Institutions Act Prevents Nonprofit Hospitals from Operating as Modern Hospitals Must in Order to Fulfill Their Responsibilities to the Public.

One hundred years ago, the primary function of hospitals was to care for the poor; self-supporting patients were treated at home. Since 1900, major advances in medical science, technology and equipment have expanded the responsibility of hospitals in caring for all classes and members of the community, and with their increasing responsibilities hospitals have become larger and their services more diversified. By 1938, when Section 13c was enacted,[4] the typical

[4] The statutory reference to the institutions' "own use" is general and comprehensive and includes new hospital uses as well as those which were then common. This principle was

general hospital was a complex institution performing a wide variety of functions. This process has continued since the Second World War, under the combined impact of an expanding medical technology, the post-war population boom and rising health care expectations. Modern hospitals are becoming, and in many cases have become, medical centers which have equipment and technologies found only in an institutional setting. These medical centers provide comprehensive diagnostic and treatment services on both an inpatient and outpatient basis.[5]

The accelerating cost of hospital services has created a national crisis. A major response of hospitals to this crisis has been to extend their ambulatory and outpatient services and to provide more comprehensive services, with reduced dependence upon bed care. These are hospital services, and the administration of drugs is an integral part of them. To ignore these facts is

recognized in *Eastern Kentucky Welfare Rights Org.* v. *Simon* (D.C. Cir. Oct. 9, 1974) 506 F.2d 1278 at 1287-1288. See also *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, (1st Cir. 1969) 421 F.2d 61 at 72-73; *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.* (6th Cir. 1925) 5 F.2d 411, cert. den. (1925), 269 U.S. 556, cited with approval in *Fortnightly Corp.* v. *United Artists* (1968) 392 U.S. 390 at 396, fn. 16; *Cain* v. *Bowlby* (3d Cir. 1940) 114 F.2d 519 at 522-523, cert. den. (1940) 311 U.S. 710, cited with approval in *Browder* v. *United States* (1941) 312 U.S. 335 at 339-340.

[5] The transformation of the traditional general hospital, and the scope of its contemporary community responsibilities are described in "Institutional Pharmacy Practice in the 1970's," (1971), HEW Publication DHEW Pub. No. (HMS) 73-3001. A copy of material parts of that study is attached as Appendix D, infra, A20. See also "The Hospital" by John V. Knowles, President of the Rockefeller Foundation, in Scientific American, September 1973 at p. 128.

to do an injustice to a basic public policy of the Act: The reduction of health care costs.

The court's definition limiting "hospital use" to drugs dispensed to bed patients and to emergency patients is anachronistic, and would limit the Nonprofit Institutions Act exemption to hospital purchases which could not be the subject of Robinson-Patman Act claims in any event.

3. The Court's Decision is An Abrupt and Unfortunate Retreat From the Only Previous Construction of Section 13c, Which Has Been Until Now the Prevailing View of the Statute, and Creates Uncertainty Over Its Scope and Effect Which This Court Should Put to Rest.

This is only the second time that any court of appeals has construed the Nonprofit Institutions Act,[6] and the uncertainty resulting from the evident inconsistency between the two decisions affects every nonprofit institution which seeks and every supplier which extends price concessions in reliance on the statute.

In *Logan Lanes, Inc.* v. *Brunswick Corp.*, supra, (9th Cir. 1967) 378 F.2d 212, cert. den. (1967) 389 U.S. 898, Anno. 3 A.L.R. Fed. 996 (1970), the court applied the exemption to a public university's purchases of bowling alleys and supplies at reduced prices

[6] The Act was referred to in a footnote in an opinion announcing, but dissenting from the decision in *Students Book Company* v. *Washington Law Book Co.* (D.C. Cir. 1955) 232 F.2d 49 at 50-51, fn. 5, cert. den. (1956) 350 U.S. 988. The opinion stated that sales in transactions which were not with the universities, but with self-sustaining campus bookstores for resale at a profit, were not purchases by the universities for their "own use."

for the "primary purpose" of providing physical education programs and recreation for students, faculty and their guests. It held that the exemption was applicable, even though the general public was admitted to the facility, which competed directly with plaintiff's privately operated bowling alley. The court held that the exemption would apply even if public use was "substantial," and it did not require any segregation of use or limitation of access or service to the public.

The court in *Logan Lanes* did not seek to define the traditional services of a university — which might or might not include bowling alleys — nor did it challenge the application of Section 13c to all parts of the institution's program as defined by its administration.

The opinion in *Logan Lanes*, which suppliers, including petitioners, have followed in their marketing policies, is a critically important alternative to the decision in this case and cannot be avoided by asserted distinctions between fixed assets and supplies: Use by persons not affiliated with the institution can be controlled in both cases. As in *Logan Lanes*, the application of the exemption should depend on the predominant purpose of the purchase and its use in fulfilling the needs of the purchasing institution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 10, 1975

APPENDIX A

Opinion of the Court of Appeals

Filed December 26, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors and all others similarly situated in the State of Oregon,
Plaintiff-Appellant,
vs.
ABBOTT LABORATORIES, an Illinois corporation; AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation; BRISTOL MYERS COMPANY, a Delaware corporation; CARTER-WALLACE, INC., a Delaware corporation; ELI LILLY AND COMPANY, an Indiana corporation; ENDO LABORATORIES, INC., a Delaware corporation; ORTHO PHARMACEUTICAL CORPORATION, a New Jersey corporation; SQUIBB CORPORATION, a Delaware corporation E. R. SQUIBB & SONS, INC., a Delaware corporation; A. H. ROBINS COMPANY, INC., a Virginia corporation; WILLIAM H. RORER, INC., a Pennsylvania corporation, and WARNER - LAMBERT PHARMACEUTICAL COMPANY, a Delaware corporation,
Defendants-Appellees.

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U. S. Court
of Appeals

OPINION

No. 73-2342

On Appeal from the United States District Court
for the District of Oregon

Before: MERRILL and WALLACE, Circuit Judges,
and POWELL, District Judge*

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* Honorable Charles L. Powell, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

MERRILL, Circuit Judge:

Plaintiff-appellant commenced this action as the assignee of the antitrust claims of more than sixty retail pharmacies engaged in business in the Greater Portland, Oregon, area. Suit was brought against twelve manufacturers of prescription drugs and sought injunctive relief and damages. Appellant's complaint was stated in five claims, only the second of which is involved in this appeal.[1] That claim charges that defendant drug manufacturers have violated the Robinson-Patman Act, 15 U.S.C. §§ 13, et seq. (1970),[2] by selling to certain hospitals[3] at prices lower than those charged to the retail pharmacies, appellant's assignors; that the favored hospitals, to some extent at least, then engaged in the resale of the drugs so sold. Defendants-appellees contend that the sales

[1] The district court granted a summary judgment on this claim and noted a controlling question; we accepted the interlocutory appeal under 28 U.S.C. § 1292(b).

[2] Section 13(a) makes it "unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where such commodities are sold for use, consumption, or resale * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

[3] Appellant designates the following hospitals: Dwyer Memorial Hospital & Medical Center; Emanuel Hospital; Good Samaritan Hospital & Medical Center; Gresham Community Hospital; Holladay Park Hospital; Physicians and Surgeons Hospital; Portland Adventist Hospital; Portland Osteopathic Hospital; Providence Hospital; St. Vincent Hospital & Medical Center; Tuality Community Hospital; Willamette Falls Community Hospital; Willamette Methodist Convalescent Center; Bess Kaiser Hospital.

in question are exempt from operation of the Act under 15 U.S.C. § 13c (1970), which reads:

> "Nothing in section 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

After limited discovery and submission of affidavits the district court granted summary judgment in favor of appellees on that claim. The court ruled that each of the fourteen hospitals here involved was "not operated for profit" and that the drugs had been purchased and used for each hospital's "own use." Both of these rulings are assigned as error on this appeal.

We reject appellant's contention that the hospitals did not qualify for exemption (even as to that portion of the purchases which might be "for their own use"), since none of them were "hospitals [or] charitable institutions not operated for profit." It was undisputed that the hospitals derived substantial profits from the sale of drugs and from time to time enjoyed over-all operating surpluses. However, the existence of such profits or surpluses is not in itself enough to foreclose availability of the exemption. In an integrated medical center it is to be expected that one department may provide financial support to another. No enterprise such as these could long remain in existence if each department consistently operated at a loss. Nor could it expect long to continue the fortuity of operating each department or the hospital as a whole pre-

cisely at the break-even point. There was no allegation that these hospitals (with the possible exception of Kaiser, *see infra)*, distributed assets to any interested person, and they could not do so under the terms of their charters. The surpluses were expended in the overall cost of continuing operations or invested for the improvement of facilities.[4] Accordingly, the district court did not err in ruling that the thirteen hospitals other than Kaiser were "not operated for profit" within the exemption. *Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967).[5]

We believe the district court erred, however, in granting summary judgment as to sales made to Bess Kaiser Hospital. The effect of this hospital's operation as an element of an organization providing comprehensive health services to members for a predetermined fee, and the possibility that some of its physicians, partners in the Permanente Clinic, receive distributions based on net revenues of the Kaiser Foundation Health Plan (to which revenues from drug

[4] Since the exemption of appellees' sales is founded on the purchasers' status as nonprofit hospitals, we need not consider the possible relevance of the parallel exemption for "charitable institutions not operated for profit."

[5] Since we limit the exemption to purchases by the hospitals "for their own use," we need not decide whether other uses to which the drugs purchased were put could be regarded as removing drugs purchased for such other uses from the nonprofit exemption. Assuming *arguendo* that some purchases by the hospitals were put to uses outside the nonprofit exemption, the exemption as to drugs purchased for hospital uses would not necessarily be unavailable. *Cf. Young Men's Christian Ass'n* v. *Department of Revenue*, — Or. —, 522 P.2d 464 (1974).

sales may contribute), appear to present disputed issues of fact which may be material to the hospital's nonprofit status under the exemption. Moreover, in our judgment the proper legal standard for determining whether Bess Kaiser Hospital is "not operated for profit" in these circumstances cannot be developed on the limited record before us. Since we remand the cause for further proceedings, this issue can more fully be explored below.

The remaining issue is whether purchase of drugs for resale were purchases by the hospitals "for their own use" as that phrase is used in § 13c. With disputed issues of fact resolved in favor of appellant for purposes of the motion for summary judgment, it appears that drugs were distributed by the hospitals under the following circumstances:

1. They were dispensed to the hospitals' inpatients in the course of treatment.

2. They were dispensed in the course of treatment to patients at emergency clinics operated by the hospitals.

3. They were provided to departing in-patients as take-home prescriptions.

4. They were provided to persons who had been inpatients as renewals of prescriptions which had first been filled while those persons were in-patients.

5. They were sold for home treatment to outpatients either at hospital pharmacies or at out-patient clinics.

6. They were sold to the hospitals' employees and students for the private use of purchasers.

7. They were sold to hospitals' physicians for their personal or family use or for dispensation in the course of their private practice.

8. They were sold to walk-in customers who were not hospital patients.

The circumstances covered by categories 1 and 2, relating to in-patient and emergency treatment, cover by far the greater part of hospital distribution. There is no dispute that such dispensing of drugs in the course of treatment in the hospital is the hospitals' own use. It is as to distribution under other circumstances that the parties are in dispute, both factually, as to the frequency of occurrence, and legally, as to whether those uses of the drugs can properly be regarded as the hospitals' own use.

Appellees justify the uses thus made by the hospitals as proper hospital functions. It is asserted that the need of the departing in-patient for take-home drugs is obvious, and that supplying this need is an essential hospital function; that sales to former patients are in connection with hospital or clinic treatment earlier provided and permit such treatment to continue at home; that sale to employees is pursuant to collective bargaining agreements; that sales to students are an aspect of the hospitals' educational programs; that sales to physicians associated with the hospitals are a perquisite of that association; that sale to walk-in customers is limited to instances when

needed drugs cannot be obtained elsewhere; that in all respects a decent regard for the needs of the community and the position of the hospital as a center for the provision of a full range of health services justifies all use made by the hospitals of the drugs sold to them.

We may concede that in these respects distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospitals' "own use." Hospital use under § 13c, in our judgment, must be limited to use made by the hospital in dispensing drugs for hospital or clinic treatment of in-patients or emergency patients. The purpose for which these supplies are purchased—the use to which they are to be put—is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer.

The hospitals here are (quite properly) accommodating patients, staff and strangers with means whereby they can conveniently purchase for *their* use. The question is not whether the hospitals can continue to provide this useful community service. The question is whether in providing it they may acquire the drugs for such resale at an acquisition price that discriminates against local retail druggists. We hold that they may not.

Logan Lanes, Inc. v. *Brunswick Corp.*, *supra*, does not require the contrary result. There the alleged dis-

criminatory pricing was for bowling alley equipment sold to a state university. The lanes had been acquired for use in connection with the university's physical education program and for recreational use of faculty, staff and students and were operated for those purposes. They were not, however, closed to the general public and some public use (the extent was disputed) was made of them. We held:

> "The primary purpose of the purchases established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff. This being the case, any additional use of the bowling facilities by the general public for a fee, even if such use is substantial, would not establish that the purchases were not made for the use of the University."

378 F.2d at 216. The university's public use was indeed in competition with other local alleys, and it may be questioned whether the university should not, in all fairness, have been compelled to choose between the public use and the favorable exemption. But that is not what the statute requires. It requires only that the "supplies" be acquired by the university for its own use. It does not say that once acquired and put to that use they cannot then be used for any other purpose.

Our case does not involve the acquisition of plant equipment. It involves acquisition of stores of supplies. Plant equipment acquired for a university's own use cannot be segregated from that acquired for use

by others, since the same equipment serves both uses. In the case of stores of supplies acquired for consumption the situation is otherwise. Supplies that are resold can readily be segregated from those devoted to a hospital's own use.

In this respect our case is similar to *Students Book Co.* v. *Washington Law Book Co.*, 232 F.2d 49, 50-51 n. 5 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956), where the 13c issue was disposed of in a footnote. The plaintiff, a retail seller of law books, complained of the defendant's sales at lower prices of books to campus bookstores at law schools. The distinction drawn by the court was similar to the one we draw here—between sales of books to universities for their own use, *i.e.*, for their libraries, and sales to university connected bookstores for resale to students.

Our holding makes it unnecessary for us to deal with the remaining assignment of error.

The judgment is vacated and the cause remanded for further proceedings.

APPENDIX B

Oral Opinion of the District Court Granting Partial Summary Judgment on May 25, 1973

Despite the suggestion by Mr. Kane that I should make written detailed findings, I do not do so. I cannot; if I took the time to give a written opinion, it would be far beyond the two-month period which Mr. Tilbury mentioned in his letter and my decision would be the same at the end of that time. The grammar would be better, but I intend to rule upon this from the bench at this time.

What is presented, of course, is a question of statutory construction, and I am frequently reminded when I get into statutory construction cases of the statement which Justice Frankfurter made in *Greenwood versus the United States*. In case anybody's interested in the citation, 350 U.S. at 374, who said, I guess with tongue in cheek, "This is a case for applying the canon of construction of the wag who said when the legislative history is doubtful, go to the statute."

I think that's what I'm required to do here, although also ran across a rather intriguing remark made by Justice Holman in the products liability decision that just came out *Markel (phonetic) versus Mul How* (phonetic), 196 Oregon Advance Sheet 1739. He said, "In the final analysis, it is the intention of the legislature that governs the lack of legislative history on this particular point indicates that in all probability the legislature never considered the matter which is true of most statutory construction problems or else they would not exist." And I'm called upon to construe the statute here. However, before I indicate to you what my ruling will be, I'm going to respond to the motion to strike portions of the affidavits which have been submitted by plaintiff, and as I read the cases which Mr. Wright's memo, I believe it was Mr. Wright's memo, talks about, he contends that the moving party in a summary judgment motion not only has the right but indeed the duty to move to strike affidavits which it believes are inappropriate in whole or in part, and then there are in effect the equivalent, because by the plaintiff's objection to the so-called statements by witnesses, deposition witnesses, I suppose is sort of the equivalent of that, but again if I were to rule with the detail that Mr. Kane requested on this motion, not only would it take more than two months, it would probably take about two years.

I'd like to just quote from certain affidavits which have been submitted in this case. First from Mr. Tilbury's affidavit filed March 21, 1973 in Paragraph 14 of the affidavit there is a quotation from what Mr. Tilbury swears is the March 21, 1973 Wall Street Journal in which reference is made to a certain SEC proceeding in which apparently Kaiser agreed to the Federal Court injunction which arose from a case in which the SEC brought charges of securities fraud against Kaiser. Kaiser apparently entered into what I understand would be the equivalent of a consent decree, but the article goes on to say, "Kaiser agreed to a Federal Court injunction without admitting its

guilt, without admitting or denying guilt, but the matter still isn't closed. The Royal Canadian Mounted Police are continuing a criminal investigation in a possible violation of British Columbia Securities law."

In Mr. Kane's March 20 affidavit, which is 45 pages and contains a number of attachments by way of exhibits, Exhibit B5 is — well, excuse me, Exhibits B2 through B6, B1 through B6, is a photocopy of the cover of Rampart's Magazine for November, 1970 together with the pages of an article about Kaiser. The article apparently is entitled "Kaiser and the Health Business."

This is a four-page article, and the justification for the affixing of this article to the affidavit appears on Page 43 of the affidavit. The statement is made, "Additional authoritative indicia that the quality or lack of quality in Kaiser medical and drug care is a disputed issue, is Exhibit B to this affidavit. Exhibit before it made a part of the trial court file by this reference is a copy of the covering article by Judith Milgrom Carnoy titled, "Kaiser: You Pay Your Money and Take Your Chances," published in Rampart's Magazine November, 1970.

It is sufficient for me to say that to whatever extent that material in the affidavits which have been submitted is relevant, I have taken it into account. To the extent that it is irrelevant, I have not taken it into account, and if that is [not] an adequate finding, I'm sure that there will be appellate advice to that effect forthcoming.

With respect to the defendants — excuse me — with respect to the plaintiff's objection to the so-called estimates, that objection will be treated as overruled.

We come, then, to the central issue in this case which is whether or not the defendants' motion for summary judgment should be granted, and I have no hesitation in saying that I believe that it should and I intend to grant it for the reasons I will indicate briefly.

The vast majority of the drugs which are purchased here and which are used by the hospitals are for the use of the hospital clearly within the meaning of Section 13(c); whether that percentage be 85 or 90 or 95 is of no moment because even Mr. Kane agrees that the truly in-patient that is the hospitalized bed patient and for practical purposes, the person who receives treatment in the emergency ward, receives the type of treatment for which the section was intended.

This leaves us with the other categories which have been mentioned, and I will simply summarize them. With respect to out-patient treatment whether it be initial or repeated out-patient treatment, I do not believe that it was the Congressional purpose to render inapplicable the statute merely because there was a change in the distribution of health care wherein the degree of out-patient treatment increased over the years since the '30's when this statute was passed.

With respect to the take-home drugs, that is by those who are issued prescriptions by doctors at the

time that they are discharged from the hospital where they have normally been in-patient or bed patient, it seems clear to me that that also falls within the clear meaning of the applicability of the statute and that such drugs are indeed for the use of the hospital and thus qualify for the exemption.

With respect to the furnishing of drugs to employees and staff physicians and other members of the staff, I have some mild degree of question, but not sufficient in my mind, to justify denying the motion for summary judgment. I think this may fairly be said to be for the use of the hospital.

With respect to the walk-in patients, I am persuaded by *Logan-Lanes* that even though it might be said that those are not for the use of the hospital, nonetheless, the fact that walk-in sales exist in the amounts indicated by this record would not justify withdrawing from the hospitals the exemption of 13(c).

Furthermore, the fact that there is a dispute apparently as to the exact number of walk-in sales or the exact dollar amount of walk-in sales, would not in my judgment amount to a genuine issue of material facts sufficient to justify denial of the motion for summary judgment.

In short, I believe under *Logan Lanes*, the conduct and the pattern established here by this record is such that the Ninth Circuit would, in fact, conclude that a motion for summary judgment should be granted as to the second cause of action because I believe that the Ninth Circuit would agree with me that there is no genuine issue of material fact in the second cause of action.

Furthermore, even though I have a little more difficulty in my mind with the Kaiser situation than with the so-called fee for service or so-called non-profit hospitals, that is Emanuel, St. Vincent and the others which have been mentioned, nonetheless, I conclude that it is fairly within the Congressional purpose in that the establishment of satellite pharmacies and satellite clinics throughout the area is not so divorced either conceptually or substantially from the purposes and functions of a hospital, the central hospital institution itself.

I conclude it's not so divorced as to justify withholding from that organization benefits of Section 13(c).

As I say, I have some — I am not as sure in my own mind with respect to the Kaiser situation as I am with respect to the other hospitals which have been mentioned, but if, in fact, there is a policy judgment to be made analyzing and studying the policy that Congress had in mind and how it can best be effectuated at this point in time, 35 years after it's enacted, the Ninth Circuit is a far better able Court and group and body to elaborate policy and if, in fact, the Kaiser type of plan which as Mr. Clarke has said and as indeed Mr. Kane has agreed is the emerging form, whether or not that takes such a form as to have significant effects on persons such as plaintiff assignors

and if, in fact, the action of this Court is destructive of what Congress' policy is or ought to be, then I think that is a policy decision for the Ninth Circuit to make.

I do not believe I am doing a disservice to the Congressional policy by rendering this decision in this fashion.

Learned Hand — at one time, I think it was Learned Hand, spoke of the art of statutory construction as being the proliferation of purpose and necessarily, when a single District Judge in Portland, Oregon sits and tries to proliferate the Congressional purpose of three-and-a-half decades ago, one must approach the task with some degree of diffidence and hesitation. I've given it the best study I can, Gentlemen, and I believe that this decision is consonant with and not in contradiction to the Congressional purpose of enacting 13(c) and so for the reasons I have indicated and bearing in mind that I'm sure my learned brethren on the Ninth Circuit will forgive the atrocity of my grammar, I grant the motion.

Furthermore, on the assumption that Mr. Kane would move as he did in connection with the earlier ruling of this Court, I am prepared to discuss Section 1292 Sub-B. Do you so move, Mr. Kane?

(Whereupon a brief off-the-record discussion was had.)

MR. KANE: All right, Your Honor, we would be happy to have the Court certify this for an interlocutory appeal, although we are not very happy with the state of the record.

THE COURT: And do you renew the motion which you made last fall at the time I ruled on Causes of Action No. 3 and 4 for a similar certification?

MR. KANE: Yes, we do, Your Honor.

THE COURT: All right. Do you gentlemen desire to be heard in opposition to that motion—Mr. Clarke?

MR. CLARKE: No desire to be heard, Your Honor.

THE COURT: I'm satisfied that this order as well as the corresponding orders issued last fall concerning Count III and Count IV involve together a controlling question of law as to which there is a substantial ground for difference of opinion and I am furthermore of the opinion strongly that an immediate appeal from this order and the one last fall disposing of Counts III and IV may materially advance the ultimate termination of litigation.

I will so state in writing pursuant to the provisions of 28 U.S.C., 1292, Subsection B, when you present such an order and I would assume, Mr. Clarke, that you will follow the issue of policy that we established some time ago.

You should prepare an order, check it with Mr. Kane and be prepared to present it to me in such fashion that you can assure the Court that there is no objection as to form.

FILED
March 11, 1975
Clerk
U.S. Court of Appeals
DOCKETED
March 12, 1975

APPENDIX C

Order of the Court of Appeals Filed March 11, 1975
Denying Petitioner's Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors,	)	No. 73-2342
Plaintiff-Appellant,	)	ORDER
vs.	)	
ABBOTT LABORATORIES, et al.,	)	
Defendants-Appellees.	)	

Before: MERRILL AND WALLACE, Circuit Judges,
AND POWELL, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

The applications of American Hospital Association and Oregon Association of Hospitals to appear as amici curiae are denied.

APPENDIX D

A partial text of "Institutional Pharmacy Practice in the 1970's," 28 American Journal of Hospital Pharmacy 240 (1971) HEW Publication DHEW Pub. No. (HMS) 73-3001. The authors are Donald C. Brodie, of the University of California, and Mrs. Joe B. Graber, who were, respectively, the Director and the Special Assistant to the Director of the drug-related studies program of HEW.

Early in the 1960's the American Hospital Association approved a ". . . Statement on the Changing Hospital. . . ." The underlying concept in the Statement was that the hospital would become the repository for and custodian of a community's health resources — physical plant, technical manpower and equipment. Steps were taken in the past decade toward fulfilling this projection, in fact, some believe the hospital now is acquiring the qualities of the community health center.

Numerous factors are contributing to this development. For example, the hospital is growing "centrally" because of increasing demands for its services, continual scientific specialization, and centralization of health resources. On the other hand, it is growing "peripherally" since it is being required to extend its services into the community because of the forces created by the physician shortage in selected areas and the need for lessening the high density of patients at the hospital. Thus, the community hospital

is growing "inwardly" and "outwardly" simultaneously.

As health centers, some community hospitals are providing a full spectrum of diagnostic and treatment
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services to the sick in addition to preventive and maintenance services to the apparent well. Community hospitals are assuming responsibility for selected social, environmental, rehabilitative and other health-related services. Some of this centralization of services has resulted from shifts taking place in the delivery of selected services from long-term to acute care hospitals. The sharing of services also has been a contributing factor.

The emergence of the hospital as a community health center frequently represents a realignment of resources and management. Horizontal realignment is taking place through the establishment of satellite hospital systems, chains and mergers, while vertical realignment is seen where hospitals are providing for graded levels of care.

The facilities for a system of comprehensive care may be clustered on a common campus, structured around the hospital. In other cases, services will be provided in an off-campus facility located at some other point in the community to facilitate access to primary care of some specialized service. Modern communication systems will permit continuous contact with the parent institution. Whatever arrangements develop in a given community, the hospital retains the

central focus while its authority and that of its medical staff will extend to wherever in the community its services are needed.